80-1980

No. _____

Office-Supreme Court, U.S.
FILED
MAY 23 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GORDON S. MITCHELL,

Petitioner,

v.

THE SECRETARY OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an Army Reserve officer with 19 years, 7 months and 29 days of "qualifying service" toward retirement can be legally discharged from his commission in the Army Reserve without his consent, allegedly "for cause", contrary to federal statute, viz., Section 205(b) of the Reserve Officer Personnel Act of 1954 (68 Stat. 1147, et seq) on the recommendation of a board of officers meeting ex parte and without a hearing of any kind, in violation of the Army's own regulations directing such hearing procedures.

2. Whether a discharge from the Army "for cause" does not denote unfitness to hold public office, incompetence, intentional misconduct or other wrongdoing requiring compliance with the Army's own regulations directing written notification to the officer of the date, time and place of hearing, and an opportunity to be present, be represented by counsel and to present evidence in his own behalf.

3. Whether the Army can ignore with impugnity complying with applicable federal statutes and its own published regulations, and unilaterally terminate petitioner's Reserve commission "for cause" without a hearing where he is within the statutory sanctuary period with over 19 years of "qualifying service".

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No. _____

GORDON S. MITCHELL,

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v.

THE SECRETARY OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Gordon S. Mitchell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the premises on December 24, 1980.

OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit, unpublished, entered on December 2, 1980, and the Order by the same United States Court of Appeals, denying the petition for rehearing, filed on December 24, 1980, appear in the Appendices as Appendix A and Appendix B respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia was entered on December 2, 1980. Timely petition for rehearing was denied on December 24, 1980. By Order dated March 13, 1981, the Chief Justice granted petitioner's application for an extension of time within which to file a petition for a Writ of Certiorari, to and including May 23, 1981. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The statutes concerned are The Reserve Officer Personnel Act of 1954, Public Law 773, September 3, 1954 (68 Stat. 1147), and 10 U.S.C. 1552, providing for the correction of military records administratively. The Rules are those portions of Rule 15 and Rule 56, Federal Rules of Civil Procedure, including Rule 1-9(g), Rules of the United States District Court for the District of Columbia. The regulations involved are Army Regulations No. 140-175, Department of the Army, dated 24 February 1955, and Special Regulations No. 15-20-1, Department of the Army, 13 August 1953. Applicable portions of the above-cited references have been extracted, reproduced and added in the Appendix.

STATEMENT OF THE CASE

Petitioner, a professional film and audio communications production executive in civilian life, was commissioned in the Officers Reserve Corps of U.S. Army on 2

November 1929. This began a long association as a Reserve officer at a time when the Signal Corps was initiating and developing a program of film and audio training for future military use – a new project within the Army requiring the professional expertise of the film-making industry.

Prior to World War II, petitioner had been very active in the Reserve. At one time he was the only Reserve Signal Corps officer in the entire motion picture industry. He was instrumental in organizing the Signal Photo Companies, including eight Signal Corps Photographic Laboratory units, personally selecting personnel who were qualified for such assignment, thereby recruiting professional film-making personnel for appointment in the Reserve. All of these units were subsequently activated and distinguished themselves in the various theatres during World War II.

Petitioner served on active duty during WW II where his performance was superior at which time he was the commanding officer of the 4th Signal Photographic Laboratory Unit which was assigned to the South Pacific and subsequently in the Southwest Pacific theatres. Following demobilization at the conclusion of the war, petitioner was again actively engaged in the motion picture industry operating his own production company working through 20th Century Fox Studios, producing educational and commercial training films under contract for the Air Force, Navy and Public Health Service, among others.

From late 1949 to 1955 there was no Reserve Photo activity available where petitioner could participate. The nearest was the Signal Corps Pictorial Center, Long Island City, New York, a unit diagonally across the country. He was in close personal contact with the senior military officers directing the Signal Corps activities after WW II and was in regular communication with them concerning any

possible Reserve assignment where his previous military experience and professional training could be utilized. Several of these senior, regular officers were long-time friends from the time of their detail for duty to the film industry prior to the war. They were aware of and respected his professional expertise and welcomed his interest and association with the Army Reserve program. He was advised to await developments.

In June or July 1954, petitioner received a personal message from the Chief of the Army Pictorial Service, Office of the Chief Signal Officer of the Army at the Pentagon, announcing that a newly-designated photographic unit was to be activated on the west coast under the command of Jack M. Warner, a Reserve officer and a fellow motion picture executive. Petitioner immediately contacted Colonel Warner, was invited to apply for transfer, was interviewed and recommended for assignment to the new organization. During the next 12 to 14 months petitioner was engaged in a continuing series of communications by correspondence and telephone with various Reserve personnel officers at the Southern California Sub-District headquarters at Fort MacArthur, inquiring as to the assignment orders in an effort to expedite the process. Colonel Warner, the newly-designated unit's commander personally followed up the matter with higher headquarters attempting to unsnarl the delay and hasten petitioner's transfer to his organization.

Despite official communications from the Office of the Chief Signal Officer in Washington, the receipt of orders for active duty training, etc., petitioner, without his consent and over his express objection, was involuntarily discharged and transferred to the Retired Reserve on 29 September 1955.[1] At that time he had earned a total of 19

[1]Section 205(b) of the Reserve Officer Personnel Act of 1954 (68 Stat 1147)

years, 7 months and 29 days of "qualifying service" toward 20 year retirement under the statute.

Prior to the enactment of the Reserve Officer Personnel Act of 1954, 3 September 1954, the Army Reserve program represented questionable supervisory administration. Point credit was erratic, lacking in uniformity and training was uncoordinated, unimaginative and subject to the ability, industry and dedication of the volunteer leaders. The size of the groups varied from a few to a substantial number. Attendance was irregular and excuses were generously extended and subject to pressures of favoritism, cronyism and political abuse. Training materials, texts, aids, etc., were non-existent and lesson topics left largely to the ingenuity of the supervising officer of the host installation. Duty assignments consisted often of elementary, routine orientation and discussion periods of idle conversation and reminiscing sessions of WW II experiences of various members. The wearing of the uniform was frequently not observed and the hours and scope of training sessions were as irregular as convenience permitted. The program frequently discouraged rather than encouraged participation particularly of experienced WW II officers busy with their civilian occupational pursuits.

Petitioner pursued all sources of administrative redress known to him through 1963 to no avail. However, in 1972, he first learned of the existence of the Army Board for the Correction of Military Records from the Army Reserve Components Personnel and Administration Center. This information, including an application form and a set of instructions, was contained in a letter, dated 29 August 1972, in response to a query on another matter. He promptly contacted the Board for access to his records and was advised about a year later "that his records had probably been destroyed by fire at the National Personnel

Center in St. Louis, but that efforts were being made to reconstruct his file from other records." To avoid further delay, he used what records he had and applied to the Correction Board for relief.

Two applications for administrative relief were made to the Army Board for the Correction of Military Records pursuant to 10 U.S.C. 1552, both of which were denied without a requested hearing. In each instance, petitioner's application was supported by substantial documentation. The first application included a total of 30 exhibits, much of which has been adopted and incorporated by the Army as supporting documentation in the preceedings in the courts below.

His request for reconsideration, submitted on 30 January 1979, asked for a hearing where he would provide witnesses in Washington from California and elsewhere at no expense to the Government in order to assist the board in evaluating all of the relevant evidence. Senior military officers, familiar with the facts, appearing in person, being examined under oath and observed by the board would assure that all pertinent, available evidence was before the Board for fair consideration of the issue in dispute.

Petitioner then filed for a declaratory judgment alleging a denial of "due process" under the Constitution and a violation of federal statutes, along with a request for production of documents and interrogatories, neither of which was answered. Summary judgment without a hearing, over his objection and evidence of disputed issues of fact, affirmed in the court below, brings the matter to this Court for review.

Petitioner's complaint for a declaratory judgment sought only prospective equitable relief, i.e., official Army recognition of honorable retirement with 20 years of

service as an Army Reserve Officer under Title III. It was not a claim for retroactive retirement pay nor a "raid on the federal Treasury" as represented by the Army.[2] The trial court granted the Army's motion for dismissal without a hearing, and petitioner recognizing the ambiguity in is prayer, moved to amend the complaint to correct an inadvertent error. The motion to amend was denied by the trial court without a hearing.

REASONS FOR GRANTING THE WRIT

1. The court below has decided a question of Constitutional "due process" and the noncompliance with applicable federal statutes by the Executive Departments and Agencies of the Federal Government in a manner not in accord with applicable decisions of this Court.

The statutory proscription of the Reserve Officer Personnel Act of 1954, effective 3 September 1954, (68 Stat. 1147) is fully binding on the Army. The statute is unequivocal. Efforts by the Army to rationalize an exception favorable to their interpretation are specious and nonpersuasive. By their own admission, petitioner had earned a total of 19 years, 7 months and 29 days of "creditable service" on the date of discharge. He was within the sanctuary.[3]

Section 205(b) of the Act provides as follows:

> "Notwithstanding any other provisions of this Act, except as provided in section 328 and 339, if

[2]Memorandum of Points And Authorities In Support Of Defendant's Motion To Dismiss, And In The Alternative for Summary Judgment, served August 31, 1979.

[3]Sec. 205(b) of the Reserve Officer Personnel Act of 1954, (58 Stat. 1147)

on any date prescribed for the transfer from an active status or discharge of any Reserve officer, he has been credited with, or is entitled to be credited with nineteen or more, but less than twenty years of satisfactory Federal service for retired pay purposes under the provisions of title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, such officer shall not, *without his consent,* be transferred from an active status or discharged pursuant to this Act prior to the date on which he is credited with twenty years of such satisfactory Federal service, or prior to the second anniversary of the date on which he would otherwise be transferred from an active status or discharged, whichever is earlier, unless transferred or discharged for physical disability, cause, or by reason of attaining the maximum age at which transfer from an active status or discharge is required by this Act." (Emphasis added)

Section 202(b) of the Act provides:

"To be retained in an active status, a Reserve officer (other than an adjutant general or assistant adjutant general of a State or Territory, or the District of Columbia) shall, *in any applicable yearly period,* attain the minimum number of points (not to exceed fifty) prescribed by the appropriate Secretary with the approval of the Secretary of Defense (or by the Secretary of the Treasury with respect to the Coast Guard, when the Coast Guard is operating as a service in the Treasury Department) and shall conform to such other standards and qualifications as the appropriate Secretary may prescribe. Subject to section 204 of this Act, a Reserve officer who fails to attain the prescribed number of points or

> to conform to the prescribed standards and qualifications, *shall upon his application,* be transferred to the Retired Reserve if qualified, or if he is not qualified or does not apply for transfer to the Retired Reserve, shall be transferred to the inactive status list if qualified, or if not transferred to the Retired Reserve or the inactive status list, shall be discharged." (Emphasis added)

The question is: what does "in any applicable yearly period" mean? On 4 April 1955, when the Southern California Sub-District at Fort McArthur, notified petitioner that he was to be mandatorily processed for mandatory removal from Active Reserve status for failure to acquire 27 points in the preceding year, when did that "preceding year" begin and when did it expire?

The statute was dated 3 September 1954. On the premises that some time was required by the Army administrative process to prepare, implement, coordinate the approval of the Secretary of Defense, publish and disseminate to the subordinate field units applicable instructions, directives and regulations, it could have been well into winter or early spring of 1955 before such instructions, directives and regulations were received by such field units as the Hqs. Southern California Sub-District at Fort MacArthur, California. If so, did the intent of the statute permit retroactive application of the "applicable yearly period" or was this action an arbitrary discretionary determination made by a subordinate headquarters?

The Army's own "Memorandum of Points And Authorities In Support Of Defendant's Motion To Dismiss, And In The Alternative For Summary Judgment", in Civil Action No. 79-1694, to the United States District Court, is quoted as follows:

> "With the enactment of Section 202(b) of the Reserve Officer Personnel Act of 1954 Pub. L. 773, 68 Stat. 1147 (3 September 1954) (hereafter ROPA), retention standards were statutorily tied to accumulation of points *for the first time.* Where an officer failed to meet retention standards he would, upon his election, be transferred to the Retired Reserve or inactive status. If not qualified for either or upon failure to elect, he would be discharged." (emphasis added)

The absence of a hearing or a response to petitioner's interrogatories on discovery (both of which the Army chose to ignore); the mandatory removal from active status contrary to the proscription of the applicable statute; the discharge "for cause" without a notice, hearing, or counsel; or an opportunity to be heard in defense of the adverse action against him; raise serious questions of due process and violations of federal statutes and executive agency regulations, which this Court has held are impermissible under our system of law.

In addition to the foregoing discussion, petitioner states that the court below erred in overlooking the trial court's denial of petitioner's motion to amend his pleading, and in granting the Army summary judgment without a hearing which deny him the protection to which he is entitled under the Constitution and the Federal Rules of Civil Procedure.

The prevailing case law of this Court and of this Court of Appeals and the trial court below, favors such amendment under circumstances set forth herein. Rule 56 of the Federal Rules of Civil Procedure[4] and Rule 1-9(g) of the local rules for United States District Court,[5] together with

[4]See Appendix G

[5]Ibid.

the applicable case law, support petitioner's contention that he is entitled to a hearing on the question of controverted issues of fact.

The questions of the denial of petitioner's motion to amend the prayer of the complaint to remove any ambiguity in the pleading, and the trial court's granting of respondent's motion for summary judgment in view of sworn evidence of the existence of "substantial issues in dispute", are contrary to applicable decisions of this Court. In *Bell v. Hood,* (1946) 327 U.S. 678, 682, this Court established the rule of liberality in amending to preclude dismissal of the action. In *Adickes v. S.H. Kress,* 398 U.S. 144, this Court held that: "A party moving for summary judgment has the burden of showing the absence of any genuine issue as to any material fact, and for these purposes, the material lodged by the movant must be received in the light most favorable to the opposing party."

The foregoing brief summary of actions, administrative and judicial, taken by the respondent to deny the petitioner a hearing on the merits of the issues in dispute, represents what petitioner states are "not in accord with applicable decisions of the Court.

2. The Court of Appeals overlooked and misapplied the commonly-accepted judicial definition of the term "cause".

The Court of Appeals, in a 10 minute hearing on 20 November 1980, erred in affirming the trial court's judgment.

In finding

> "that the Correction Board's decision that the discharge in this case was 'For Cause' is fully sup-

> ported by the record. *See* 10 U.S.C. Sec. 1006(d) (1976)"[6]

the court below misconceived, misconstrued, misapplied and overlooked the generally-accepted understanding and connotation of the term "for cause".

The commonly-accepted judicial definition of the term "for cause" denotes an adversary situation implying the member's unfitness, misconduct or other wrongdoing, disqualifying the individual from holding public office, e.g., as a commissioned officer in the Army Reserve thereby prejudicing his position, standing or reputation in the military community. In addition, in this case it also deprived him of a valuable property right to which he would have been entitled but for the illegal discharge action taken by the Army.

The dictionary definitions of the word "cause", current as well as historical, offer no support for the Army's interpretation. This Court in *Ex parte Milligan,* 71 U.S. 2, over a century ago, looked to Webster for a definition in a landmark decision which is quoted as follows:

> 'A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right" and he says, "this is a legal, scriptural and popular usage of the word, coinciding nearly with case, from *cado,* and action from *ago,* to urge and drive."

Webster's Third International Dictionary, Unabridged, defines "cause" in part as follows:

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[6]See Judgment of the Court of Appeals, entered Dec. 2, 1980, Appendix A.

> "2 a 1 - a ground of legal action; 2 - a legal process (as a suit or action in court) by which a party endeavors to obtain his claim or what he regards as his right; case; b — the presumptive or underlying fact of a transaction at civil law."

In each instance, the word "cause" implies an adversary situation where "due process" would necessarily require an opportunity for the individual to be notified, be present, be heard, to present evidence in his own behalf. Anything less is not "due process".

While it does not appear that this Court has directly addressed the question of the discharge of a military Reserve officer "for cause", this Court has dealt with the problem as it pertained to veterans reemployment rights of federal employees. The statutes involved were the Universal Military Training and Service Act, the Veterans Preference Act, and the Administrative Procedure Act, which are somewhat analogous.

Generally, these decisions have focused on definitions of "cause" for removal to promote the efficiency of the service and must he gauged by the nature of the particular service involved as well as by the competency of the employee, and only if it is reasonable to discharge employees because of certain conduct and where the veteran had fair notice, express or implied that such conduct would be grounds for discharge, and while the agency enjoys wide discretion in determining what reasons may justify removal of federal employees, such discretion is not unlimited, and due process forbids all dismissals which are arbitrary and capricious.

The Army concedes that "cause" is not defined in the Act nor in the legislative history of the Reserve Officer Personnel Act of 1954. However, they contend that "in the

absence of limiting language" the discharge for cause should be construed to any involuntary discharge".[7] This conclusion is a self-serving interpretation of convenience which is inimical to the fundamental principle of American jurisprudence. It becomes an arbitrary, dictatorial exercise of executive discretion which is impermissible under the due process of law as determined by the Court.

Turning to the matter of "consent" as set forth in the statute, i.e., the proscription

> "* * *, such officer shall not, *without his consent,* be transferred from an active status or discharged pursuant to this Act prior to the date on which he is credited with twenty years of such satisfactory Federal service."[8] (Emphasis added)

is summarily dismissed by the Army as inapplicable to them since they state that petitioner's discharge was "for cause" and therefore no consent was required.

The phrase "without his consent" in the statute is not idle rhetoric. Congress obviously had a purpose for including the requirement. It recognized that following the rapid expansion and demobilization of millions of citizen soldiers at the conclusion of WW II, that there was a requirement for an experienced, professional cadre of trained reserve officers to insure a basic leadership structure for any future contingency. It realized that an unregulated, fragmented, and uncoordinated military reserve

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[7]Pgs. 6, 7, Memorandum of Points and Authorities in Support Of Defendant's Motion To Dismiss, And In The Alternative For Summary Judgment, served 31 August 1979.

[8]Sec. 205(b), Reserve Officer Personnel Act of 1954, (68 Stat. 1147).

represented a potential source of cronyism, assignment, appointment and promotion favoritism and political abuse which could undermine the entire concept.

The Army acknowledged that Lt. Col. Mitchell did not "consent" to the separation, but their defense to this lack of consent is premised on a illegal and impermissible exercise of administrative discretion in violation of due process and federal statutes. The "for cause solution" advanced by the Army which in their judgment eliminated the requirement of a hearing is totally inconsistent with the traditional system of fairness and justice.

The Army was clearly in violation of the statute (68 Stat. 1147), was subject to the statute, and as such was bound to obey the mandate of the law. This Court is respectfully requested to review the disregard of the federal statute by a military department of the Executive Branch of the Government to preclude an abuse of power. At no point has the petitioner been accorded his rights for an opportunity for a hearing on the issues in dispute to present the full facts which the Army prefers to ignore.

This Court has not been hesitant to review cases in which a violation of the Constitution, statutes, or regulations, is alleged. In *Harmon v. Brucker,* 335 U.S. 579, 582, the Court held that "generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." "Such actions," the Court continued, "cannot be sustained in law."

3. The Army must comply with Federal Statutes and its own applicable regulations.

This Court has repeatedly held that it is a fundamental tenet of our legal system that the Government must follow its own regulations. Actions by an agency of the Executive

Branch in violation of federal statutes and its own regulations are illegal and void. Citing: *Vitarelli v. Seaton,* 359 U.S. 535, *Service v. Dulles,* 354 U.S. 363, *Accardi v. Shaughnessy,* 347 U.S. 260. See also: *Morton v. Ruiz,* 415 U.S. 199, 235, where this Court stated: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures; this is even so where the internal procedures are possibly more rigorous than otherwise would be required."

This Court has likewise held that "where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 437.

"The Constitutional right to be heard is a basic aspect of Government to follow a fair process of decision-making where it acts to deprive people of their property or rights to property." *Fuentes v. Shevin,* 407 U.S. 67. See also: *Baldwin v. Hale,* 1 Wall 223, 233, *Windsor v. McVeigh,* 93 U.S. 274, *Hovey v. Elliott,* 167 U.S. 400, *Grannis v. Ordean,* 234 U.S. 385.

Again, this Court has held that the opportunity for a hearing must be granted at a meaningful time and in a meaningful manner, citing *Armstrong v. Manzo,* 380 U.S. 545, 552, *Goldberg v. Kelly,* 397 U.S. 254. See also: *Snaidach v. Family Finance,* 395 U.S. 337.

In *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 170-172, this Court stated: "When Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal. The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice

fairness; and fairness can rarely be obtained by secret, one-sided determination of the facts decisive of rights." See also: *Boddie v. Connecticut,* 401 U.S. 371, 378, *Bell v. Burson,* 402 U.S. 535, 542, *Shroeder v. New York,* 371 U.S. 208, *Mathews v. Eldridge,* 424 U.S. 319, 334-335, *Carey v. Piphus,* 435 U.S. 247, 259-262, *Marshall v. Jerrico,* 446 U.S. 238.

In perhaps no other area of the law has this Court spoken more consistently, directly and forcibly than in the matter of the Government and its executive agencies being held to a strict accounting for their failure to honor the Constitutional rights of its citizens and to respect the dignity of Federal statutes and their own regulations. This has invariably included the right of a meaningful notice of a hearing, the opportunity to be present and be represented by counsel and to meet the case against him with evidence favorable to his cause, in all situations where the individual's rights of freedom and property are affected. Such is the principle of democracy.

In the instant case, petitioner has at no time been accorded these basic rights to which he is entitled.[9] In view of this Court's long history of established and controlling judicial decisions in these areas of due process, he prays for a review by this Court and a grant of his petitition for a writ of certiorari to the court below.

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[9]See, e.g., Army Regulations No. 140-175, 24 February 1955, Paragraphs 1, 2, 3, 7, and 13; Special Regulations No. 15-20-1, 13 August 1953, 1, 2, 6, and 8, Appendix G.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-2509

Gordon S. Mitchell,
Appellant

v.

The Secretary of the Army

Civil Action No. 79-1694

FILED Dec. 24, 1980
George A. Fisher
Clerk

ARGUED 11-20-30

BEFORE: Wright, Chief Judge, Wilkey, Circuit Judge and Gesell*, Judge, United States District Court for the District of Columbia

ORDER

On consideration of appellant's petition for rehearing, filed December 16, 1980, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX B

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-2509

SEPTEMBER TERM, 1980

GORDON S. MITCHELL,
Appellant

Civil Action No. 79-1694

United States Court of Appeals
for the District of Columbia Circuit

FILED Dec. 2, 1980
George A. Fisher
Clerk

v.

SECRETARY OF THE ARMY

[No Opinion]

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, WILKEY, Circuit Judge, and GESELL,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local rule 13(c).

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of.

This court finds that the Corrections Board's decision that the discharge in this case was "For Cause" is fully supported by the record. *See* 10 U.S.C. § 1006(d) (1976).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GORDON S. MITCHELL,
Plaintiff,

v. Civil Action No. 79-1694

THE SECRETARY OF THE ARMY,
Defendant.

ORDER

Upon consideration of plaintiff's motion for leave to amend his complaint, the memorandum of points and authorities in support thereof and in opposition thereto, and of the entire record, it is this 14th day of November, 1979,

ORDERED that plaintiff's motion be, and it hereby is, denied.

/s/ Aubrey E. Robinson, Jr.
United States District Judge

FILED Nov. 15, 1979
JAMES F. DAVEY, CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GORDON S. MITCHELL,
Plaintiff,

v. Civil Action No. 79-1694

THE SECRETARY OF THE ARMY,
Defendant.

ORDER

It is by the Court this 22nd day of October, 1979,

ORDERED, that this Court's Order dated October 16, 1979, in the above-captioned action be amended, so that the last two lines reading "FURTHER ORDERED, that Defendant's Motion for Summary Judgment is DENIED," are deleted, and the following inserted:

"FURTHER ORDERED, that Plaintiff's Motion for Summary Judgment is DENIED."

/s/ Aubrey E. Robinson, Jr.
United States District Judge

FILED
OCT. 22, 1979
JAMES F. DAVEY, CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GORDON S. MITCHELL,

Plaintiff,

v. Civil Action No. 79-1694

THE SECRETARY OF THE ARMY,

Defendant.

ORDER

Upon consideration of the parties' Cross Motions for Summary Judgment, and the entire record herein, the Court notes that (1) Plaintiff was involuntarily retired from the army reserves in 1955; (2) Plaintiff completed more than 19 but less than 20 years of service; (3) Plaintiff reached retirement age in 1967; (4) Plaintiff did not receive retirement benefits because he failed to complete 20 years of service; (5) § 205(b) of the Reserve Officers Personnel Act provides that an officer may not be involuntarily discharged without cause if he has been a member of the reserve for more than 19 but less than 20 years; (6) This Act was in effect when Plaintiff was involuntarily discharged; (7) 28 U.S.C. § 2401(a) provides for a 6 year statute of limitations period; (8) Regardless of whether a cause of action accrued when Plaintiff was discharged or when he reached retirement age, the statute of limitations expired; (9) A separate cause of action accrures, [sic] however, pursuant to 10 U.S.C. § 1552, which provides for the correction of military records, *Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978); (10) This, of course, does not toll the statute of limitations on Plaintiff's former cause of action. Rather, his cause of action regarding benefits prior

to a possible correction of records has expired. If Plaintiff was successul, he would only be entitled to prospective relief. See *DeBow v. U.S.*, 434 F.2d 1333 (Ct. Claims 1970). (11) Regardless, 10 U.S.C. § 1552 provides for a time limitation. Once three years had expired from the time Plaintiff discovered the alleged injustice, (as it did here), correction of his military records was purely discretionary. The Secretary's refusal to change Plaintiff's military records was not arbitrary or capricious.

Accordingly, it is by the Court this 16th day of October, 1979,

ORDERED, that Defendant's Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED, that Defendant's Motion for Summary Judgment is DENIED.

/s/ Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX F

PUBLIC LAW 773 (68 STAT. 1147)
TITLE II – THE RESERVE COMPONENTS GENERALLY

* * *

Sec. 202.

(b) To be retained in an active status, a Reserve officer (other than an adjutant general or assistant adjutant general of a State or Territory, or the District of Columbia) shall, in any applicable yearly period, attain the minimum number of points (not to exceed fifty) prescribed by the appropriate Secretary with the approval of the Secretary of Defense (or by the Secretary of the Treasury with respect to the Coast Guard, when the Coast Guard is operating as a service in the Treasury Department) and shall conform to such other standards and qualifications as the appropriate Secretary may prescribe. Subject to section 204 of this Act, a Reserve officer who fails to attain the prescribed number of points or to conform to the prescribed standards and qualifications, shall, upon his application, be transferred to the Retired Reserve if qualified, or if he is not qualified or does not apply for transfer to the Retired Reserve, shall be transferred to the inactive status list if qualified, or if not transferred to the Retired Reserve or the inactive status list, shall be discharged.

* * *

Sec. 205.

(b) Notwithstanding any other provisions of this Act, except as provided in sections 328 and 339, if on any date prescribed for the transfer from an active status or discharge of any Reserve officer, he has been credited with

or is entitled to be credited with nineteen or more, but less than twenty years of satisfactory Federal service for retired pay purposes under the provisions of title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, such officer shall not, without his consent, be transferred from an active status or discharged pursuant to this Act prior to the date on which he is credited with twenty years of such satisfactory Federal service, or prior to the second anniversary of the date on which he would otherwise be transferred fron an active status or discharged, whichever is earlier, unless transferred or discharged for physical disability, cause, or by reason of attaining the maximum age at which transfer from an active status or discharge is required by this Act.

* * *

APPENDIX G

Army Regulations
No. 140-175

ARMY RESERVE
OFFICER SEPARATIONS

1. Purpose. – a. These regulations provide procedures and outline conditions under which Reserve officers not on active duty in their reserve status may be separated.

b. Separation of Reserve officers while on active duty in their reserve status will be in accordance with AR 605-200, AR 605-245, AR 635-120, SR 135-175-5, and SR 600-220-1.

2. Definitions. – a. The term "separation" as used herein includes discharge, vacation of appointments, and dropped from the rolls.

b. The term "Reserve officer" as used herein means, unless otherwise specified, commissioned and warrant officer members of the Army Reserve not on active duty.

3. General. – a. A Reserve officer holds an appointment as a Reservist (commissioned or warrant officer) of the Army in accordance with section 222, Armed Forces Reserve Act of 1952 (66 Stat. 487). Separation of such officers will be from their status as a Reservist of the Army, which action will also terminate their membership in the Army Reserve. See c Below for obligation for further service.

b. The Armed Forces Reserve Act of 1952 provides that the discharge of Reserve commissioned officers shall be effected at the pleasure of the President, and the discharge of Reserve warrant officers shall be in accordance with regulations promulgated by the Secretary of the Army (sec. 248). Under section 249(a) of that Act, an officer

who has completed 3 years of commissioned service shall not be involuntarily discharged or separated except pursuant to the approved recommendation of a board of officers convened by competent authority or the approved sentence of a court-martial. The foregoing requirement does not apply to the separation of an officer whose age exceeds the maximum prescribed for his grade and classification (sec. 231) or one who has been dropped from the rolls by reason of having been found guilty by the civil authorities of any offense, which results in a sentence to confinement in a Federal or State penitentiary or correctional institution (sec. 249 (b)).

* * *

7. Boards of officers.—a. Area commanders will convene boards of officers to make recommendations for discharge of Reserve officers in cases indicated in (1) and (2) below. (See SR 140-15-1 for appointment and composition of the boards and SR 15-20-1 for procedures.)

(1)Involuntary separations of Reserve officers who have completed 3 or more years of commissioned service except.

(a)When discharge action is being taken pursuant to the recommendation of a board to officers convened under other regulations, which includes discharge action under paragraph 23c, AR 135-155, convening of a second board under these regulations is not required.

(b)When officer is dropped from the rolls. See paragraph 10.

(c)When officer's age exceeds the maximum prescribed for his grade and classification.

(2)All separations of Reserve officers for misconduct or unfitness, regardless of length of service.

b. Officers will be a afforded an opportunity to appear before the boards of officers convened under these regulations, unless separation is for inability to locate the officer. If an officer does not desire to appear before the board a statement indicating that he will not appear before the board should be submitted by him.

c. In cases of misconduct or unfitness (a (2) above), the reports of misconduct or other unfitness on the part of any Reserve officer not on active duty will be forwarded to the area commander who will cause such investigation to be made as he deems necessary or as may be directed by higher authority. The officer concerned will be informed of the alleged misconduct or unfitness and notified of the action being taken. In the case of alleged overt acts of homosexuality, statements, reports and evaluations indicated in AR 635-89 will be secured. If the investigating officer recommends discharge or if the area commander disapproves the investigating officer's recommendation for retention as a Reserve officer, a board of officers will be convened to investigate further and make recommendations. The Reserve officer may appear before the board in person and/or by counsel, or he may present a brief. If the officer appears before the board he may testify in person or elect to remain silent, but, should he elect to testify, he may be required to submit to examination by the board as to any matters concerning which he has testified. When discharge is for cause, the officer may waive board proceedings and *consent* to discharge under conditions other than honorable (see paragraph 11). This may be accomplished by resignation of the officer for the good of the service, stating that board proceedings are waived and that he *consents* to discharge under conditions other than honorable (fig. 3).

d. Area commanders are authorized to approve or disapprove the findings of the board of officers and to

take appropriate administrative action to include discharge with the following exceptions:

(1)The involuntary discharge of an officer with 3 or more years of commissioned service may *not* be accomplished unless discharge is recommended by the board, in view of Sec. 249 (a), Armed Forces Reserve Act of 1952 (66 Stat. 495; 50 U.S.C. 992).

13. Action required on unanswered communications — When a communication to which a reply is required is mailed to a Reserve officer and a reply is not received within such reasonable time limits as local conditions may warrant, or if the communication is returned by postal authorities because of inability to locate the addressee, the following action will be taken:

a. The dispatching agency will verify that the address to which the communication was sent was the last address which the officer reported.

b. A followup communication then will be sent by registered mail, with return receipt requested to be signed by addressee only, to the verified address.

c. If a reply is not received within 30 days from the date of delivery as indicated by the registry receipt, or if other notification is not received within 30 days after the return of the undelivered registered communications, subordinate commanders may recommend, through channels to the area commander, the officer's discharge under these regulations. There will be attached to such recommendation copies of communications remaining unanswered, or returned unclaimed, or the substance thereof with the dates and addresses used will be shown in the recommendation and a brief description of any other means used to locate or communicate with the officer will be given. Area commanders will insure that such recommendations and

the inclosures thereto are forwarded to the board of officers convened for discharge of the officer, and are included with the records forwarded to The Adjutant General under paragraph 14, in addition to the copy of instrument of separation to be forwarded as required in paragraph 6a.

d. Notwithstanding the provisions of *c* above, any member with a service obligation under the Universal Military Training and Service Act, as amended, will not be discharged under paragraph 6b(5) prior to completion of his legal service obligation.

* * *

SR 15-20-1

Section I

GENERAL

1. General – Investigating officers and boards of officers (which may consist of only one officer) usually are appointed under Army Regulations pertaining specifically to the matter requiring investigation. These regulations are supplemental to such specific regulations and, in addition, will govern in the investigation of matters not covered in specific regulations. In case of conflict between these regulations and pertinent specific regulations, however, the latter will govern. These regulations are not applicable to investigation of court-material charges. *See Uniform Code of Military Justice, Article 32, and Manual for Courts-Martial, United States, 1951, chapter VII.*

2. Function – The primary purpose of any investigation, whether conducted by an investigating officer or by a board of officers, is to ascertain facts and to report them to the appointing authority as the basis for some appropriate action by him. It is the duty of any investigating officer or board to make a complete and impartial presentation of the evidence on both sides, and to make such findings and recommendations as may be appropriate and warranted by the facts. Failure of an investigating officer or board to conform to these regulations in conducting an investigation and in submitting findings of fact and recommendations shall not, in itself, render void any action of the appointing authority, or any superior authority, based thereon.

* * *

6. Duties and functions of investigating officer or recorder or junior member of board. – *a. Prior to hearing.*

(1) In every case in which the conduct, efficiency, fitness, or pecuniary liability of any person is to be investigated, such person will be afforded a hearing and the investigating officer or the recorder or junior member of the board of officers if no recorder is designated (acting under the supervision of the senior member) will, at a reasonable time in advance of the hearing, deliver or dispatch by messenger or mail to the individual concerned a written communication stating –

(a) The date, hour, and exact place of convening.
(b) The specific allegations or questions to be investigated.
(c) The names of probable witnesses to be called.
(d) That the investigating officer, or the recorder or the junior member of the board, will endeavor to arrange for the presence of any available witnesses desired by the individual concerned upon timely written request therefor.

A copy of this communication, bearing the certificate of the investigating officer or the recorder or the junior member of the board that it is a true copy and that the original was delivered or dispatched, will be read in evidence and the record will affirmatively show this action.

(2) He will give timely oral or written notice to all concerned, including, when appropriate, members of the board, of the date, hour, and exact place of convening.

(3) He will notify and arrange to have present at the hearing witnesses who are to testify in person, including witnesses desired by the individual concerned, and a reporter and interpreter if required.

(4) He will obtain a suitable room for the hearing; see that it is in order; procure requisite stationery; and take such other action as will enable a prompt, full, and systematic presentation of the case.

(5) He will insure that all records and documents referred with the case are furnished, when appropriate, to the members of the board.

b. During hearing.

(1) The recorder or junior member of the board will execute all orders of the board. The investigating officer or the recorder or junior member of the board will keep or superintend the keeping of the required record of proceedings.

(2) At the initial session, the investigating officer or the recorder or junior member of the board will read the appointing order. At each session, the investigating officer or the recorder or junior member of the board will note for the record the presence of (the members of the board) the individual concerned, if present, and his counsel, if any.

(3) The investigating officer and, under the direction and supervision of the president or senior member of the board, the recorder or junior member of the board may conduct the presentation of evidence and examination of witnesses so as to make as complete and impartial presentation of the evidence on both sides as is possible.

c. *After hearing.* — The investigating officer or recorder or junior member of the board will prepare or superintend the preparation of the report of the proceedings as prescribed in paragraphs 28 and 30.

* * *

8. Individual entitled to have counsel. — When the law or regulations so provide, *an individual* under investigation is entitled to have counsel. If the law or regulations do not so provide, such an individual is not entitled as a matter of right to be represented by counsel. However, when it appears that a full and fair investigation will be expedited thereby, or when the nature of the case warrants, or for other cogent reasons, including cases in which an officer or enlisted man is under investigation for conduct which might involve him in criminal prosecution or furnish grounds for disciplinary action, or which might be fairly regarded as jeopardizing his commission, grade, rating, or status, counsel will be provided.

* * *

APPENDIX G.
DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS THE PENTAGON, WASHINGTON, D.C.

IN THE CASE OF: MITCHELL, GORDON S. 561-18-6813

DATE: 28 March 1979
DOCKET NUMBER: AC73-035260
INDEX NUMBER: 135.02

COUNSEL:

Col. Carl J. Felth
Box 32421
Washington, DC 20007

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present:

Mr. Gordon M. Hobbs	Chairman
Mr. William D. Masters, Jr	Member
Mr. Harold C. Sebring	Member
Mr. Raymond J. Williams	Executive Secretary
Mr. Watts P. Tyler	Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application.

The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A – Application for correction of military records
Exhibit B – Military Personnel Records
Exhibit C –

NAME: MITCHELL, GORDON S., 561-18-6813

APPLICANT REQUESTS: Reconsideration of his application for a correction of records to show that he was discharged from the United States Army Reserve (USAR) on 2 February 1956, rather than 29 September 1955.

APPLICANT STATES: That his transfer from an active status to the Inactive Reserve on 29 September 1955 was in direct violation of 10 U.S.C. 1006; that further, ABCMR's denial of his prior application was without the Board having the full benefit of the entire factual picture of the situation as it then existed and as it applied to his case. Applicant has engaged an attorney who has filed a four page typewritten brief with five exhibits in the applicant's behalf. In the brief it is contended that the clause "for cause" cited in 10 U.S.C. 1006 clearly implies an adverse action; that any definition of fairness, administrative or otherwise, such contemplated action, particularly where individual private property rights are concerned, mandates

a formal notice to the individual and an opportunity for him to respond and to challenge the action about to be taken; that anything less is a direct violation of administrative due process; that in the applicant's original application to the Army Board for Correction of Military Records the evidence submitted described in detail the diligent efforts made by the applicant to secure a training assignment that he had been assured was available; that the mishandling errors cannot be charged to him; that a formal hearing where the demeanor of the witnesses can be observed and where there is an opportunity for clarifying questions by the Board is imperative to insure a fair and just resolution of the issues in question. The entire brief is contained in the applicant's OMPF.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memorandum and included by this reference are the military and medical records which reflect in pertinent part:

Date of Birth: 1 March 1907

Applicant accepted appointment as second lieutenant, Signal Corps, in the Officers Reserve Corps (ORC) on 2 November 1929. He attained the grade of captain, ORC, before entering on active duty on 27 October 1942. He was promoted to the temporary grade of major during World War II and was promoted to the grade of lieutenant colonel, ORC, upon his release from active duty on 16 July 1945.

A prior request for the same stated action was denied by this Board on 6 November 1974. The brief that was prepared at that time is attached.

Applicant's entire case was reviewed in the Office of The Judge Advocate General on 16 March 1979. It was the opinion of that Office that the action taken by the Board of Officers in 1955 to discharge him from the Army Reserve

represented "for cause" and, therefore, the provisions of 10 U.S.C. 1006, which precluded discharge of individuals with 19 years qualifying service, did not apply. Comments attached.

The case is submitted for reconsideration in view of the additional evidence presented.

DISCUSSION: Although the applicant is contending that the action taken by the Board of Officers to remove him from the Active Reserve did not represent cause, as implied in 10 U.S.C. 1006, it appears that it does represent such cause and he was not protected by the provisions of 10 U.S.C. 1006.

Applicant's primary contention is that there was no suitable vacancy within the Army Reserve in his hometown area to which he could be assigned and earn retirement points before 1954, that as soon as a unit became available he made application for assignment, but the Department took some 14 months to approve his request. Although there may not have been a Signal Unit of the type the applicant would have liked to have been assigned during the period, there appears to be no reason for him not to have earned the minimum 27 points for retention in the Army Reserve during the period. He was assigned to the Active Reserve and the opportunity existed for him to attend training assemblies with one of the Control Groups, or earned points as an instructor, but for reasons unknown he failed to do so. A Board of Officers thoroughly considered these factors in 1955 and concluded that the evidence was such that the applicant should be removed from the Active Reserve.

/s/ illegible

Raymond J. William
Executive Secretary

BEFORE THE
ARMY BOAD FOR THE CORRECTION OF
MILITARY RECORDS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C. 20310

Re: MITCHELL, Gordon S., Lt. Col.,
USAR (Ret) Serial No. 0-267172
Social Security No. 561-18-6813

BRIEF IN SUPPORT OF REQUEST FOR RECONSIDERATION AND PERSONAL HEARING

Introduction

By letter, dated 7 August 1978, to which was attached a DD Form 149, executed on 27 July 1978, petitioner, through counsel, asked reconsideration of his application for correction of his military records and requested a hearing in Washington, at his own expense, to more fully and completely present his case to the Board.

Background Statement

Petitioner's initial application, including a legal brief with 30 documentary exhibits, Docket No. 73-3526, submitted in October 1974, was routinely denied without a hearing, presumably on the recommendation of the staff review examiner as shown by his Memorandum for the Board, dated 4 November 1974. (See Exhibit 1, attached hereto).

Discussion

Petitioner, a respected, career professional film and audio communications production executive in civilian life, was originally commissioned a Second Lieutenant, ORC, on 2 November 1929. Thus began a long and continuous association as a Reserve officer with the Army Signal Corps which was unilaterally terminated by Reserve personnel action on 29 September 1955, at a time when he had earned a total of 19 years, 7 months and 29 days of "qualifying service" toward 20 year retirement under the statute. This is in direct violation of 10 U.S.C. 1006 (b), and 1006 (d)(1).

The clause "for cause" cited in 10 U.S.C. 1006 (d)(1), clearly implies an *adverse action*. Under any definition of fairness, administrative or otherwise, such contemplated action, particularly where individual private property rights are concerned, mandates a formal notice to the individual and an opportunity for him to respond and to challenge the action about to be taken. Anything less is a direct violation of administrative *due process*.

The Reserve personnel action taken unilaterally against the petitioner on 29 September 1955 whereby "he was honorably discharged from his commission in the USAR" was clearly an *adverse action*. To deny him a hearing and the opportunity to respond in person under oath; to be examined by the members of the Board; and to provide the live testimony of former military associates familiar with the facts of the case (all at considerable personal expense to him), compounds the gravity of the unfairness visited upon him.

The desirable appearance of additional witnesses is contingent upon their availability on the date of hearing, in-

dividual convenience due to physical limitations and previous business commitments impeding travel to and from Washington. If necessary, petitioner will arrange for sworn answers to interrogatories from the Board and depositions to corroborate his testimony to the Board. The execution of such documents will comply with legal and judicial requirements of the jurisdiction concerned.

The additional fact that petitioner's official military records were among the thousands literally destroyed in the major fire occurring in the Government Records Depot in St. Louis, in the summer of 1973, and the Army's inability to confirm and/or verify the substance of petitioner's documentary evidence of record, should not prejudice the rights of the individual. As a minimum he should be entitled to corroborate by independent sworn testimony of those credible witnesses privy to the facts, certainly where this is done at no cost to the Government.

It is difficult to dismiss the presumption that the Army's obvious inability to confirm or verify the documented evidence of record as a result of the fire, prompted the staff review examiner to recommend rejection without a formal hearing or a full opportunity for the petitioner to establish under oath the merits of his claimed injustice. (See the last two paragraphs of Exhibit 1, attached hereto.)

It should be noted that the submission dated October 1974, contained in addition to a chronological outline of relevant facts and a precise statement of the applicable law, prepared by respected professional counsel, a total of thirty exhibits. These included a Statement of Service, AG Forms 249, followed by a sequence of correspondence dating from 29 September 1954 through 15 December 1973. Any objective examination of this

documented correspondence describes in detail the diligent efforts of the petitioner to secure a training assignment he had been assured was available and for which he had promptly applied. The resulting mishandling errors cannot in any sense of fairness be charged to him. He did everything he could. He cannot be faulted for the mishandling of others charged with the responsibility for routine clerical duties.

The irony of this administrative mismanagement is illustrated by the fact that just *five days after the effective date of his discharge, his assignment, for which he had applied some 14 months earlier, was approved.* See Exhibit 2, attached hereto.)

In addition to the 30 exhibits previously submitted, admittedly not in affidavit form, attention is respectfully invited to Exhibits 3, 4 and 5, added herewith. The added exhibits are current statements made under oath from facts within the personal knowledge of the affiants. These added documents represent in skeletal form the substance of the available testimony were a hearing granted. The factual posture of this case makes it extremely difficult to reduce the available evidence to concise written documents if one is to cover the subject matter properly.

A formal hearing where the demeanor of the witnesses is observed and there is an opportunity for clarifying questions by the Board is imperative to insure a fair and just resolution of the issues in question.

Petitioner's representative in Congress, the Honorable James C. Corman of California, who has taken a personal interest in this case over the years has joined in a separate request directly to the Secretary, the

Honorable Clifford L. Alexander, to urge that a personal hearing be granted.

Conclusion

To continue to ignore the equity and basic fairness of petitioner's request is a disservice to the Army and to him as a citizen. Further, it flouts the clear intention of Congress as expressed in 10 U.S.C. 1552. At the very least he should be entitled to the opportunity to appear before the Board and to present such available evidence as he can produce for an objective and fair determination of the issues.

It should be noted that the petitioner's request is at no expense to the Government, but is at a substantial cost to him for travel across the country for himself and such other witnesses as are conveniently and physically able to travel to and from Washington. Such request under these circumstances cannot be dismissed as frivolous as implied by the staff review examiner still handling the case in a personal conference with the undersigned counsel in his office in the Pentagon on 11 September 1978.

On this premise any consideration by less than the full Board itself following a formal hearing and sworn testimony of knowledgeable witnesses does not suggest a fair and just determination of the matter involved.

For the foregoing reasons, as well as all matters of records, approval of petitioner's request is respectfully urged.

Respectfully,
Carl J. Felth
Colonel, USAF (Ret)
Counsel for Petitioner

January 30, 1979

Box 32421
Washington, D.C. 20007
Telephone: 522-8889

EXHIBIT1

MEMORANDUM FOR: ABCMR DATE: 4 Nov 1974

NAME: MITCHELL, GORDON S., 561-18-6813 Rank: LTC STATUS: HD-USAR, 29 Sep 55

APPLICANT REQUESTS: That, in effect, his records be corrected to show that he is credited with 20 years qualifying service and eligible for the receipt of retired pay UP 10 U.S.C. 1331-1337.

APPLICANT STATES: That at the time of his discharge from the USAR he had 19 yrs, 7 mos and 29 days qualifying service; that he would have had more but there were no Sig Corps Reserve Units in his area. In support of his applicant, his attorney has submitted a brief which essentially states he was erroneously discharged from his commission in the USAR because at the time of discharge he had completed more than 19 yrs service and Sec 205 (b) of the Reserve Officer Personnel Act of 1954 stated the member would not be discharged without his consent prior to the date on which he is credited with 20 years service. See complete statement attached.

MATERIAL EVIDENCE OF RECORD: Incorporated into this memorandum and included by this reference are the military records which reflect, in pertinent part:

> DOB: 1 Mar 1907; applicant accepted appointment as 2LT-ORC on 2 Nov 29. He had several short periods of active duty for training during the years 1930 to 1942. During that period he was promoted to the grade of CPT-ORC and on 27 Oct 42 he was ordered to extended active duty in that grade. He attained the grade of ma-

jor during WW II and was appointed LTC-ORC upon his REFRAD on 16 Jul 45. After his REFRAD he failed to participate in the Reserve program, but was retained in the Active Reserve.

In 1948 the Retirement Equalization Act was enacted (Now 10 U.S.C. 1331-1337) and required members of the Reserve components to earn a minimum of 50 points on and after 1 Jul 49 to be credited with a qualifying year for retirement purposes.

On 7 Mar 50 the department issued SR 140-160-1 and required an officer to earn 27 points for which retirement point credits were maintained on or after 1 Jul 49 for retention in the Active Reserve. A waiver could be granted for any one year that the member failed to earn 27 points. The regulations further specified that failure thereafter to participate in the Reserve program would be grounds for transfer to the Inactive Reserve.

The applicant failed to earn 27 points during the period 1 Jul 49 - 30 Jun 50 and on 25 Jul 50 was transferred to the Inactive Reserve.

On 11 Dec 53 the applicant was transferred to the Active Reserve. He again failed to participate in the program and on 4 Apr 55 correspondence was forwarded to the applicant from the Southern California Military Sub-District informing him that he was to be processed for mandatory removal from the Active Reserve because of failure to earn 27 points during the preceding year. The applicant protested the action indicating that he had applied for a transfer to a Reserve Signal Unit in Los Angeles. As a result, his case was referred to a Board of officers to make recommendations on whether he should be retained in the Active Reserve.

On 27 June 55 the Board recommended the applicant's removal from an Active Reserve status and on 9 Aug 55 the Applicant was offered the opportunity to either be transferred to the Retired Reserve, or discharged. He failed to do either and further requested assignment to the Signal Unit in LA.

On 29 Sep 55 he was honorably discharged from his commission in the USAR.

10 U.S.C. 1006 which was enacted on 3 Sep 54 stated, in pertinent part, that if on the date prescribed for the discharge or transfer from an active status of a reserve commissioned officer he is entitled to be credited with at least 19, but less than 20, years of service, he may not be discharged or transferred from an active status without his consent before the date on which he is entitled to be credited with 20 years service, or the second anniversary of the date on which he would otherwise be discharged or transferred from an active status.

10 U.S.C. 1001 states that the Secretary concerned shall, by regulation, prescribe standards and qualifications for retention of members of the Reserve components and equitable procedures for the periodic determination of the compliance of such reservists with those standards and qualifications; that if a reservist fails to comply with the standards and qualifications prescribed, he shall be transferred to an inactive status; or have his appointment terminated. (Basis for SR 140-160-1, heretofore cited).

DISCUSSION: The Applicant's records were badly damaged in the fire in St. Louis on 12 Jul 73. The applicant had completed more than 19 years service at the date the Retirement Equalization Act became effective (1 Jul 49). He failed to earn 27 points for the retirement year en-

ding 10 Dec 54. In fact, he failed to participate in the program at all after his REFRAD on 16 Jul 45 until discharged on 29 Sep 55. (See attached statement of service). It appears that his discharge was consistent with Departmental directives and existing statutes and no basis exists for crediting him with 20 years qualifying service in order to be entitled to retired pay.

RECOMMENDATION: In consideration of the information available in this case, it is believed that there is insufficient evidence of probable material error or injustice to warrant a recommendation that the case be accorded a formal hearing.

/s/ Melvin P. Stout
Melvin P. Sout

WATTS P. TYLER
EXAMINER

My Commission Expires on Sept. 22, 1983

EXHIBIT 2

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF SIGNAL OFFICER
WASHINGTON 25, D.C.

4 October 1955

Lieutenant Colonel Gordon S. Mitchell, SigC-USAR
15505 Nordhoff Street
San Fernando, California

Dear Colonel Mitchell:

The Adjutant General has been requested to effect your assignment as a Signal Corps Mobilization Designee to the Signal Corps Pictorial Center, Long Island City, New York, T/D 11-9440, in the position of Assistant Chief (MOS 8520), Studio Division, T/D grade of lieutenant colonel. You will receive information in the near future concerning this assignment from your military district.

Your interest in Signal Corps activities is appreciated. I hope the above assignment will meet with your approval.

Sincerely yours,

ALDEN P. SULLIVAN
Major, Signal Corps
SigC Career Management Branch

EXHIBIT 3
AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF MONMOUTH)

CHARLES S. STODTER, being duly sworn under oath, deposes and states:

"I live in Fair Haven, New Jersey and I am a legal resident of the County of Monmouth and State of New Jersey. This statement is submitted on behalf of Lt. Col. Gordon S. Mitchell, an Army Reserve officer I have known personally since the mid-1930's, while I was serving on active duty as a liaison officer for the Army Signal Corps with the motion picture industry on the west coast.

"At this time the Signal Corps was concerned with the making of audio-visual training films, clips, etc., and my assignment to the industry was to learn and acquaint myself with the technical and professional aspects of the business. Lt. Col. Mitchell was then a prominent motion picture association executive who was highly regarded as an authority in the motion-picture making industry.

"The Army Signal Corps, being new in this field of film-making, was looking to the movie-making industry for professional and technical assistance in this highly specialized field of production. As a Signal Corps officer on active duty I was detailed to the industry for intensive training and familiarization with all aspects of the business. This took place toward the late thirties, prior to WW II.

"Lt. Col. Mitchell, being a leading figure in the industry was also an Army Reserve officer, having been commis-

sioned out of ROTC in the early 1930's and with a keen interest in the Army Reserve, we got to know one another well since we worked together for an extended period of time. He was the industry expert and I was the Army Signal Corps officer training under his supervision.

"Following regular short tours of active duty as a Reserve officer prior to WW II, Lt. Col. Mitchell was ordered to active duty in 1942 and served until late 1945 at which time he returned to civilian life and the motion picture industry.

"I know as a matter of personal knowledge that from the period 1945 to 1954, there had been no Signal Corps Reserve Unit on the West Coast for photographic and audio visual specialists to which Reserve officers with the training and experience of Lt. Col. Mitchell could be suitably assigned.

"I am certain that had any Signal Corps Reserve training been available on the west coast during the years 1945 through 1954 where his talents and abilities could have been effectively utilized, Lt. Colonel Mitchell would have applied and been surely assigned to such unit. His civilian occupation, training and expertise would have been welcome and encouraged.

"I served as Chief of the Army Pictorial Service in the Office of the Chief Signal Officer in Washington from 1950 through to my retirement in October 1954. As such I was thoroughly familiar with all of the programs available to all Reserve Officer personnel.

"I distinctly recall in June or July of 1954 while I was serving as Chief of notifying Lt. Col. Mitchell of the organization on the West Coast of a new Signal Corps Photographic Reserve Unit (Sub. Det. 6, Detachment A,

6121 Control Group USAR) then under the command of Lt. Col. Jack M. Warner, a prominent motion picture industry executive, and suggested to Lt. Colonel Mitchell that he might be interested in applying for assignment to the Reserve Training Unit.

"I understand that immediately upon notification of the organization of Sub. Det. 6, Detachment A, 6121 USAR Control Group, Lt. Colonel Mitchell applied for such assignment, one for which he was eminently qualified. I can not understand how or why it happened that his Reserve Commission was terminated in October 1955, before this assignment was made or what caused the unusual delay in effecting this assignment. I am certain that Lt. Colonel Mitchell did all that he could do to make this possible. I cannot conceive of a situation wherein he would not have acted immediately since I know he coveted such an assignment as an Army Reserve officer.

"Further, affiant sayeth not."

CHARLES S. STODTER

Subscribed and sworn to before me in the State and County aforesaid on this 7th day of November, 1978.

/s/ Melvin P. Stout

Notary Public

My Commission Expires on Sept. 22, 1983

EXHIBIT 4

AFFIDAVIT

JACK M. WARNER, after first being duly sworn, deposes as states as follows:

"In the late summer of 1954, while serving as a Lieutenant Colonel in the Army Reserve, I was assigned as the Officer In Charge of a newly-formed Reserve Training Unit, identified as Sub-Detach. 6, Detachment A. 6121 USAR Control Group, located in the Los Angeles area. This was the first and only Reserve Unit to be established on the west coast to consist of Signal Corps officers, all of whom were to be specialists in the fields of motion pictures, television and audio-visual aids to education. As the commanding officer it was my duty to help organize, staff and be responsible for the establishment of a professionally and technically proficient Army Reserve Training Program capable of providing a nucleus of expertise in the event of emergency requiring immediate mobilization of qualified specialists in this vital communications medium. For more than 9 years, following the demobilization after WW II, this facet of technical Reserve training had been permitted to deteriorate to the point that we literally had to actively recruit personnel with professional expertise in a technical specialty to meet an urgent requirement in the fields of audio-visual training. Having been identified with the motion picture business all of my adult life, I looked to the industry for prospective help, particularly those with military interest and experience.

"In late September 1954, I received a letter from Colonel Charles S. Stodter, Chief of the Army Pictorial Service, in the Office of the Chief Signal Officer of the Army from his office in the Pentagon in Washington, informing me of a WW II Reserve officer with whom he was personally

familiar. On Colonel Stodter's recommendation I immediately communicated with Lt. Col. Gordon S. Mitchell, whose credentials impressed me and whose name was familiar to me as a prominent official in the local motion picture industry. His response was immediate. Copies of this correspondence are appended as Exhibits "A" and "B".

"Following this introduction, we had numerous conversation over many months, extending well into 1955, during which time I was fully aware of his diligent and persistent efforts to join our organization. His enthusiasm and interest in the training program were refreshing. I had personally approved his application for assignment and I was looking forward to having him join us. He was the kind of an officer we urgently needed. In fact, on October 20, 1954, in a personal note I enclosed a current Training Schedule, as shown by Exhibit "C", added.

"For reasons I fail to understand, I am satisfied internal administrative mishandling of Lt. Col. Mitchell's papers by the Army Reserve Assignment Personnel in 1954 and 1955 delayed routine processing of his application an inordinate length of time. This lack of prompt action by the Army precluded his formal assignment to the unit. It is inconceivable that an officer with his demonstrated enthusiasm, interest in the training program and length of prior service can be faulted for the Army's own administrative errors.

"His involuntary transfer to the Retired Reserve only a few months prior to completing a full 20 year career in the Reserve, for reasons beyond his control is, in my judgment, a legitimate grievance which he should be entitled to present to the Board in person. I am prepared to support him in any way and to any extent I can."

STATE OF CALIFORNIA)
)
) ss:
COUNTY OF LOS ANGELES)

JUDY FINN
Notary Public California
Principal Office in
Los Angeles County
My Commission Expires April 30, 1982

On this 8th day of January, 1979, before me, a notary public in and for State and County aforesaid, personally appeared JACK M. WARNER, known to me to be the person herein described, who, after being duly sworn, acknowledged that he executed the foregoing instrument as his free act and deed.

Notary Public (S E A L)
My Commission Expires: April 30, 1982

EXHIBIT 5

AFFIDAVIT

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

GORDON S. MITCHELL, being duly sworn under oath, states as follows:

"This affidavit is submitted to again respectfully urge reconsideration and a *formal hearing at my own expense* to personally present all of the available, relevant evidence for the Board for their personal evaluation and determination of the merits of my case. (Emphasis added)

"I am advised my official file of military records is a two (2) inch mass of charred ash too fragile to handle. This reportedly resulted from a major fire at the National Personnel Records Center in St. Louis in July of 1973. Further, I have recently seen a copy of the memorandum, dated 4 November, 1974, with the recommendation prepared for the Board by the examiner currently responsible for evaluating my present request. Both of these facts convince me a formal hearing is essential for a fair and objective determination of the issues.

"Prior to the enactment of the Reserve Officers Personnel Act of 1954, the Reserve Officer Training Program was a fragmented and uncoordinated administrative effort - a fact best documented by oral testimony and detailed examination under oath by those familiar with the situation at the time. This I am prepared to do at no expense to the Government.

"My direct association with the Army Reserve dates back to my initial commission as a Second Lieutenant

-ORC in 1929. This continued uninterrupted until I was involuntarily transferred to the Retired Reserve in 1955. This is the precise basis of my grievance and complaint of injustice to the Board. This adverse action, without a hearing nor an opportunity of any kind to respond, admittedly occurred when I had a total of 19 years, 7 months and 29 days of "qualifying service" toward retirement under Title 10 U.S.C. 1331-1337. Counsel advise me this involuntary transfer is in direct violation of Title 10 U.S.C. 1006.

"Referring to the implication in the examiner's memorandum concerning failure (actually inability through no fault of mine) to earn 27 points in 1949 - 1950 and again in 1954, actually from 11 December 1953 30 June 1954, it should be noted that there was absolutely no Reserve Photo activity during the years 1949 through 1954 in which I could participate.

"On this point, some explanation is necessary. I was in the motion picture industry, operating my own production company working through 20th Century Fox Studios, producing educational and commercial films, many of which were training films by contract for the Air Force, U.S. Navy, and Public Health Service, etc.

"Prior to World War II I had been very active in the Reserve, in fact at one time I was the only Reserve Signal Corps officer in the entire motion picture industry. I assisted the Signal Corps organize Signal Photo Companies and eight (8) Signal Photographic Laboratory Units. I personally selected the personnel and actually recruited them for appointment to the Reserve. I was the prime mover in organizing a motion picture industry photographic reserve program before World War II.

"I was thus in close contact with the staff officers directing Signal Corps activities after World War II and

was in constant touch with them regarding any possible assignment to which my professional experience might apply. I was advised many times to "sit tight" and there would eventually be a unit to which I might be assigned. I was assured that my daily experience in motion picture production was good as that available in Reserve activity to which I might be assigned.

"During the entire period from 1945 through 1955 (and until much later) my daily occupational activity was primarily concerned with motion picture production. I was doing exactly the same kind of thing I would have been doing in the Reserve. Thus my daily work was "on the job" training, which I was reminded by responsible officers was better than any theoretical training I might have received from the Reserve Training then available.

"I did not feel called upon at that time, with my vast experience in film production, my World War II service as a Photographic Unit Commander, extensive Reserve activity prior to World War II, in fact since the early thirties, etc., to take basic correspondence courses on subjects in which I had long practical experience on a daily basis. In fact, I was so advised by Signal Corps officers in the Office of the Chief Signal Officer with whom I was then in regular contact.

"I am satisfied the former Chief of the Army Pictorial Service in the years 1950 through 1954, now living in retirement on the coast of New Jersey, would so testify, preferably by deposition interrogatories under oath or affidavit, since travel to Washington would be inconvenient to him.

"To imply, suggest or even intimate (as the examiner does in his memorandum to the Board) that I was in any way negligent, indifferent or lacking in diligence in my efforts

to participate in the Reserve or to seek assignment to Reserve Training is a gross misconception of fact.

"Barring a wholly new and fresh look at all of the available evidence by the entire Board, it is highly unlikely that a fair and just determination can or will be made. It is for this reason that I urge the Board to permit me an opportunity for a formal hearing."

Respectfully,

GORDON S. MITCHELL

Suscribed and sworn to before me, a notary public in and for the State and County aforesaid, on the 14 day of January, 1979

Notary Public

My Commission Expires:

Oficial Seal
KAREN C. BRADY
Notary Public – California
Principal Office in
Los Angeles County

My Commission Expires October 19, 1979

APPENDIX H

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."